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No. 94-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., a corporation,

Petitioner,

v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner Grove North America, Division of Kidde Industries, Inc., a corporation ("Grove"), respectfully submits this reply brief in support of its petition for a writ of certiorari in this case.

I. THE FEDERAL QUESTION WAS PROPERLY PRESENTED BELOW

Respondent Richard Douglas Lowe errs in contending (Br. in Opp. 5-9) that the federal question was not properly presented to the courts below. As Grove demonstrates in its petition (Pet. 4-6), Grove expressly relied on federal due

process principles and cases in both the state trial court and the state supreme court, and that reliance was sufficient to preserve the due process issue for review.

To be sure, Grove did not include an express reference to "the Due Process Clause of the Fourteenth Amendment" in all of its pleadings below, but this Court's precedents do not impose such a hypertechnical requirement on parties seeking to preserve federal questions for review. To the contrary, it is well settled that a federal constitutional claim can be preserved even without express reference to the relevant constitutional provision. Thus, for example, in *Bryant v. Zimmerman*, 278 U.S. 63 (1928), the Court held that a Fourteenth Amendment claim had been properly preserved in state court even though the appellant's trial court papers "contained no mention of any constitutional provision, state or federal." *Id.* at 67.

Similarly, in *Braniff Airways v. Nebraska St. Bd. of Equalization & Assessment*, 347 U.S. 590, 598-99 (1954), the Court concluded that a federal due process claim had been properly presented even though the appellant had not relied upon the Due Process Clause at all, instead citing (erroneously) the Commerce Clause in support of its argument that certain property was not taxable. The Court explained that, "[t]hough inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." *Id.* at 599. By the same token, because Grove argued in both courts below that "disqualification is rightly required" under the due process principles enunciated in *In re Murchison*, 349 U.S. 133 (1955), *Offutt v. United States*, 348 U.S. 11 (1954), and their progeny (*see* Pet. 4-5), there can be no question that "the due process issue [is] within the clear intendment of such contention."

Taylor v. Kentucky, 436 U.S. 478 (1978), likewise compels rejection of respondent's contention that Grove failed to preserve its due process claim. In *Taylor* the petitioner objected to an instruction on the ground that it violated "fun-

damental principle[s] of judicial fair play," without expressly referring to the Fourteenth Amendment or citing federal due process cases to support or explain the nature of that assertion. *Id.* at 482 n.10. This Court nonetheless concluded that it had jurisdiction to consider the petitioner's due process challenge, because the petitioner's objection "should have sufficed to alert the trial judge to petitioner's reliance on due process principles." *Id.* *A fortiori*, Grove's actual *citation* of federal due process cases, together with its express and repeated reliance on (and quotation of) the due process principles announced in those cases, more than sufficed to preserve the federal question for this Court's review. Respondent's contention to the contrary is entirely without merit.

II. THE QUESTION PRESENTED IS WORTHY OF THIS COURT'S REVIEW

Respondent concedes that "[q]uestions regarding . . . the financing of judicial elections are important" (Br. in Opp. 9), but nonetheless asserts that review is not warranted in this case because, in his view, there is no conflict among lower court decisions and the record is incomplete.[1] Those assertions are incorrect.

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[1] Respondent also contends (Br. in Opp. 9) that review should be denied because the question presented is not "substantial," citing *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). *Rice* construed this Court's former Rule 19, which authorized review by certiorari "'[w]here a state court has decided a federal question *of substance*.'" 349 U.S. at 74 (emphasis added). The italicized language, however, no longer appears in this Court's Rules, which indicate instead that review is appropriate where "a state court . . . has decided an *important* question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c) (emphasis added). As even respondent concedes (Br. in Opp. 9), the question at issue in this case is unquestionably "important."

In any event, even the analysis of the Court in *Rice* supports issuance of a writ of certiorari here. In that case, the Court dismissed the writ as improvidently granted upon learning that a newly adopted

[Footnote continued on following page]

A. The Decision Below Conflicts With The Decisions Of Other Federal And State Appellate Courts

1. Respondent contends (Br. in Opp. 10) that *Brown v. Brown*, 397 S.E.2d 545 (Va. App. 1990), does not conflict with the decision below because *Brown* involved a contribution for a *non*-judicial political race, whereas in this case the contribution was for a judicial election. What respondent fails to explain, however, is why the nature of the election for which the contribution is made has any meaningful bearing on the legal question at issue here. The *Brown* court squarely held that a $400 contribution to a state court commissioner's political campaign from a lawyer with a case pending before the commissioner created "a strong suspicion of improper influence" and violated the rule "that 'justice must satisfy the appearance of justice.'" 397 S.E.2d at 547 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). That reasoning is fully applicable to contributions for judicial races as well, because the impropriety arises from the identity of the contributor and recipient and the timing of the contribution, not from the type of campaign in which the contribution will ultimately be used. *Brown*'s rationale is simply irreconcilable with the result below, and certiorari is warranted to resolve that conflict. Sup. Ct. R. 10.1(b).

2. Respondent also errs in contending (Br. in Opp. 11-12) that there is no division of authority on the propriety of joint financial interests between a judge and counsel for a party to a case pending before the judge. As explained in Grove's petition (Pet. 12-13), *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820

[Footnote continued from previous page]

state statute "bars the ultimate question presented in this case from again arising." 349 U.S. at 73. The issues involved in this case, by contrast, have arisen (and will continue to arise) with increasing frequency in numerous jurisdictions, and thus they are plainly "substantial" under the test enunciated in *Rice*. *See* Pet. 16-17; *infra* pp. 8-9.

(1980), mandated disqualification of a trial judge in a closely analogous factual setting, holding that the judge's financial relationship with counsel created an appearance of partiality requiring disqualification under 28 U.S.C. § 455(a). Although not a due process case, *Potashnick* is controlling in this context as well, because the Due Process Clause—like Section 455(a)—requires the courts to achieve the "appearance of justice." *Offutt*, 348 U.S. at 14; *In re Murchison*, 349 U.S. at 136.

Respondent's attempt (Br. in Opp. 11) to distinguish *In re Disqualification of Fiftieth District Court Judge*, 483 N.W.2d 676 (Mich. App. 1992), is similarly misplaced. In that case, just as here, the trial judge and the attorney for a party to a pending case had a joint financial interest, and the judge received financial benefits from the attorney that were attributable to that joint interest. That the asset involved in *Fiftieth District Court Judge* was real estate rather than the right to attorney's fees in pending cases is obviously of no consequence. In short, the decision below is inconsistent with both *Potashnick* and *Fiftieth District Court Judge*, and review is warranted to resolve the conflict.[2]

B. The Record In This Case Contains All Of The Factual Information Necessary To Permit Plenary Consideration Of The Question Presented

1. Respondent asserts (Br. in Opp. 10-11) that the record is inadequate to permit review of the question whether a state judge may continue to preside over a case after accepting substantial monetary contributions from counsel for a party to that case. According to respondent, that question cannot be resolved without consideration of such issues as "judicial races in Alabama, total and average amounts spent,

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[2] In addition to the cases discussed in text, Grove's petition cites several other cases requiring disqualification in analogous circumstances. Pet. 13 n.9. Respondent makes no effort to distinguish those cases, effectively conceding that they cannot be reconciled with the decision below.

where specific judges' contributions come from, etc." Br. in Opp. 11.

Respondent's contention is frivolous. Grove does not seek to invalidate the entire Alabama system of judicial elections, nor does it seek review of the conduct of any Alabama judges other than the trial judge in this case. Rather, Grove's claim is that a judge's acceptance of a substantial political contribution from counsel for a party to a case pending before the judge creates such an appearance of bias that disqualification is required. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955); *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The factual issues cited by respondent are irrelevant to that claim, and the only facts that *are* relevant—the amount and timing of respondent's counsel's contribution to the trial judge, and the latter's acceptance of that contribution during the pendency of this case—are *conceded* by respondent. *See* Br. in Opp. 1 (conceding the accuracy of the facts set forth in Grove's petition); Pet. 3-4 (stating that the law firm representing respondent contributed $5,000 to the state trial judge while this case was pending before him). Thus, the factual record is complete.

2. Respondent also claims (Br. in Opp. 11) that there is "a too-slim record" in this case to permit review of the question whether trial judges may continue to preside over cases after receiving substantial monetary payments in the form of referral fees from counsel to a party. Respondent does not dispute that the law firm representing him paid the trial judge nearly $24,000 in "referral fees" during the pendency of this case, however, so there is no basis for contending that the record on this issue is incomplete. It is of no relevance whether the trial judge "might have had 90 files in his office" and "may have referred three cases each to 30 separate law firms" (Br. in Opp. 11) at the time of his election to the state bench; the improper appearance of bias in this case was created by the trial judge's financial relationship with, and acceptance of large cash payments from, respondent's counsel during the pendency of this case, not

by whatever payments the judge may have received from *other* lawyers with respect to other cases. In short, the record contains all of the factual information required.

C. The Decision Below Conflicts With Numerous Decisions Of This Court

While making no effort to demonstrate that the trial judge's conduct in this case meets the standards set forth in most of the cases cited by Grove (*see* Pet. 8-9, citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); and *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), respondent attempts to distinguish *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), by pointing to trivial factual differences between that case and this one. Br. in Opp. 12. What respondent's argument entirely ignores, however, is the *reasoning* of the *Continental Casualty* Court, which required disqualification because of the "close financial relations that had existed between" the arbitrator and one of the parties, not because of the inconsequential facts cited by respondent. *Id.* at 148; *see also id.* at 150 (White, J., concurring) (undisclosed "business relationship" with a party requires disqualification unless "the relationship is trivial"). That reasoning plainly requires disqualification in the circumstances of this case.

Nor is respondent correct in asserting (Br. in Opp. 12) that *Continental Casualty* can be distinguished because it cited (as "not controlling in this case") the Rules of the American Arbitration Association and the Canons of Judicial Ethics. 393 U.S. at 149. Respondent simply ignores the crucial passage in the Court's opinion which makes clear that, as a matter of due process, "if a litigant could show that a . . . judge in a court of justice had, unknown to the litigant, any such [close financial] relationship, the judgment would be subject to challenge." 393 U.S. at 148 (cit-

ing *Tumey v. Ohio*). The longstanding and substantial financial relationship between respondent's counsel and the trial judge in this case is at least as "close" as that at issue in *Continental Casualty*, and thus disqualification is required as a matter of due process.

D. The Question Presented Is Important

As Grove explained in its petition (Pet. 16-17), the question presented in this case involves important issues under the Due Process Clause that have not been, but should be, addressed by this Court. Recent developments serve only to bolster Grove's contention in this regard.

First, the Montana Supreme Court recently addressed a disqualification claim based on a judge's referral-fee relationship with an attorney representing a party in a case pending before the judge. *See Lutz v. National Crane Corp.*, No. 92-445, 1994 WL 476679, at *11-*12 (Mont. Sept. 1, 1994). Although the *Lutz* opinion does not state that the trial judge actually received any payment from the attorney, the case is otherwise analogous to this one, and demonstrates convincingly that the referral-fee issue is arising with increasing frequency in the state courts.[3]

Second, as shown by the *amicus curiae* brief of the Texas Justice Foundation in this case, the appearance problems created by substantial political contributions from judges to lawyers are not limited to Alabama. Over an 18-month period in 1991 and 1992, for example, plaintiffs' personal injury lawyers alone contributed nearly $1.5 million to candidates for the Texas Supreme Court, yet the Texas courts and legislature have made no effort to address the obvious due process concerns raised by such massive contributions

[3] The *Lutz* court rejected the disqualification claim, but largely for reasons unrelated to the strength of Grove's claim in this case. Moreover, *Lutz* did not involve the additional factor of substantial campaign contributions from the party's attorney to the judge, and thus the overall appearance of partiality created in this case is considerably more substantial than it was in *Lutz*.

from lawyers who practice in front of the recipients of their largesse.[4]

The issues raised by this petition reflect deep-seated flaws in the judicial systems of numerous States, flaws that strike at the heart of the Due Process Clause's guaranty of a fair tribunal. State courts in Alabama, Texas, Montana, and other States have now made clear that they will not enforce that guaranty in circumstances similar to this case. In view of the importance of these issues, the frequency with which they continue to arise, and the inability of the lower courts to resolve them in a satisfactory and consistent manner, this Court should grant certiorari in order to preserve and implement the values reflected in the Due Process Clause.

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[4] A recent study by the American Tort Reform Association ("ATRA") further demonstrates the massive and distorting influence of political contributions from plaintiffs' attorneys in Alabama. That study reveals, *inter alia*, that Alabama plaintiffs' attorneys contributed over $5 million to political candidates, including judges, between 1990 and 1994, with the 15 largest attorney-contributors giving an average of almost $150,000. *See* N. Roman, *Verdict on Political Giving: Spending in State Elections Dominated by Trial Lawyers*, Wash. Times, Sept. 13, 1994, at A10; *America's Third Political Party: A Study of Political Contributions by the Plaintiff's Lawyer Industry* 10 (ATRA 1994). More than 25 percent of the Alabama total—some $1.3 million—represents contributions to candidates for, or justices of, the Supreme Court of Alabama alone. *Id.* at 7. Significantly, the Hare, Wynn, Newell & Newton firm, which represents respondent in this case, was the fourth largest contributor among Alabama plaintiffs' firms, with firm attorneys giving a total of $262,375 to political candidates between 1990 and June 30, 1994. *Id.* at 12, 21.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 16, 1994 Respectfully submitted.

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